Supreme Court, U.S.
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No. 00-590

IN THE

Supreme Court of the United States

AT&T CORP.,

Petitioner,

v.

IOWA UTILITIES BOARD, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF PETITIONER AT&T CORP.

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REPLY BRIEF OF PETITIONER AT&T CORP.

No party opposes certiorari on the first question presented by AT&T's petition (and by the United States and WorldCom petitions): whether the Eighth Circuit erroneously invalidated part of the FCC regulation (Rule 505(b)(1)) that prescribes the method for setting rates for network elements and interconnections under Sections 251(c) and 251(d)(2) of the Communications Act. See Brief in Opposition of BellSouth, et al. ("BellSouth Br.") 2. This reply therefore focuses on the three other issues on which AT&T seeks certiorari: whether it was also error for the Eighth Circuit to invalidate the FCC's rules governing rural exemptions and suspensions (Rule 405), resale pricing (Rule 609(b)), and network element combinations (Rule 315(c)-(f)).

The private respondents' principal argument on the rural exemption and resale pricing issues is that the United States purportedly does not regard them as "importan[t]" and that the Court should not "second-guess the expert agency on that point." Brief in Opposition of United States Telephone Association, et al. ("USTA Br.") 9-10; BellSouth Br. 26. But that argument is refuted by the government's filing: The United States and the FCC contend that these issues are "of considerable importance," that the Eighth Circuit "erred" in its decision of them, and that certiorari would therefore be "appropriate[]." United States Resp. Br. 9, 16, 18, 20. Contrary to BellSouth's misstatement (BellSouth Br. 26), this Court can grant, and has granted, review of decisions invalidating an administrative regulation in precisely this circumstance. See, *e.g.*, *Arcadia* v. *Ohio Power Co.*, 498 U.S. 73 (1990) (granting certiorari, and reversing decision invalidating federal regulation, where the United States did not seek certiorari but supported the petition of a private party).

Alternatively, the private respondents attempt to portray their hard-fought victories below (on these issues and on the

network element combinations issue) as unimportant, and they claim that the Eighth Circuit's decisions are correct. These claims are equally meritless.

1. *Rural exemptions, suspensions, and modifications.* AT&T's petition demonstrated that the Eighth Circuit's invalidation of Rule 405 could broadly foreclose competitive entry in rural areas throughout the country. The rural monopoly telephone companies respond by asserting that an exemption would excuse them "merely" from complying with Section 251(c), and that potential competitors could still compete by running their own wires into the homes and businesses throughout the area and constructing their own parallel telephone networks. USTA Br. 11.

That is nonsense. The obligations of incumbent LECs "to share [their] network[s] with competitors" under Section 251(c) are "foremost" among the market-opening requirements of the Act. See *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). They are essential to competitive entry because, as "Congress recognized[,] . . . the amount of time and capital investment involved in the construction of a complete stand-beside telecommunications network are substantial barriers to entry." *Iowa Utils. Bd.* v. *FCC*, 120 F.3d 753, 816 (8th Cir. 1997). To exempt an incumbent LEC from Section 251(c) is to exempt it from competition.

And that is the case even in the one circumstance where there can be a competing network of wires into the homes – where there is an AT&T or other cable system that is otherwise prepared to make the substantial investment necessary to upgrade its wires to provide telephony. AT&T Pet. 20-21. Even then, as the FCC found, the cable system will be unusable if its customers are "unable to complete calls to subscribers served by the incumbent LEC's network," and "[a]n incumbent LEC . . . has the ability to act on its incentive to discourage entry and robust competition . . . by insisting on supracompetitive prices or other unreasonable conditions for terminating calls from the entrant's customers to the incum-

bent LEC's subscribers." *Local Competition*, 11 FCC Rcd. 15499, 15508 (1996). Thus, contrary to USTA's assertion (USTA Br. 11), it is plain that if incumbent rural monopolies are exempt from the legal obligation to provide interconnection at cost-based rates under Section 251(c)(2), the incumbent monopolist will have the incentive and the ability to charge interconnection rates that preclude competitive entry.

These are among the reasons the United States is correct to observe that "the Eighth Circuit's erroneous rulings concerning Section 251(f) could be construed to leave much of 'rural and small town America' without the primary benefits of Section 251, a result that Congress plainly did not intend," and to state that it would therefore be "particularly constructive" for the Court to review those rulings. United States Resp. Br. 20-21. Moreover, this issue is "intertwined" (USTA Br. 10) with each of the other issues on which parties have sought certiorari. Those issues involve the interpretation and implementation of particular Section 251(c) duties from which many rural monopoly LECs will now be excused *in toto*. The rural exemption issue is thus of critical importance to competition for precisely the same reasons those other issues possess crucial importance.

With respect to the merits, USTA confirms that the import of the Eighth Circuit's construction of "unduly economically burdensome" is that rural monopoly LECs can be excused from complying with Section 251(c) when the "burden" on them is merely that of facing competitors who will try to win customers by providing better service or lower prices. In particular, USTA candidly defends the proposition that rural LECs should be protected from competition (USTA Br. 3-4) and argues that under the Eighth Circuit's reading of the Act the "burdens on the LEC will be greatest" when only minimal demands for interconnection are made but "significant numbers of customers [are lost] to competition." *Id.* at 12 n.7.

But USTA – like the Eighth Circuit – provides no authority for the proposition that the statute compels, or even supports,

that counterintuitive interpretation. The Act does not define "undue," and in light of the Act's pro-competitive purposes, the FCC plainly acted reasonably when it construed "undue" to require some burden greater than that typically associated with competitive entry. USTA's and the Eighth Circuit's reliance on the fact that Congress did not *expressly* write the FCC's rule into the Act and "'could easily have [done] so,'" USTA Br. 13 (quoting GCI Pet. App. 29a-30a), stands *Chevron* on its head. That observation could be made about virtually any administrative interpretation or regulation. All it means, at most, is that the statute is ambiguous, and "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency." *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. at 397 (citing *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

USTA further attempts (USTA Br. 4-5, 14) to draw support for its argument from Sections 214(e) and 253(f) of the Act, but these provisions do not support, but undermine, the Eighth Circuit's holding. Those provisions are part of the Act's "universal service" regime. That regime provides for explicit subsidies to enable carriers – both incumbents and entrants – to serve high-cost areas, such as rural areas, and it permits state commissions to require entrants to serve the entirety of such areas rather than portions. *Those* provisions – not protecting rural LECs from competitive entry – were Congress' solution to the concern (USTA Br. 3-4) that competitors might "'cream skim[]'" the most desirable customers in a rural area and make it more difficult for incumbent monopolies to serve other customers. Indeed, these provisions were deemed necessary only because Congress *expected* competitive entry into these rural areas.

Finally, USTA's defense of the Eighth Circuit's holding on the burden of proof is equally unavailing. It is simply beside the point whether the State commission must find that compliance with the Act "'is'" or "'is not'" unduly economic-

ally burdensome. See USTA Br. 15 (emphasis omitted). In either event, the statute does not compel any particular allocation of that burden, and the agency's choice was entitled to deference. USTA now asserts (*id.* at 17) that the new entrant will somehow have "exclusive possession" of much of the pertinent information regarding the incumbent's operations, such as whether the request will impose an undue economic burden on the incumbent or whether it will be technically feasible for the incumbent to implement given the incumbent's network architecture. However, the FCC quite reasonably found otherwise, AT&T Pet. App. 193a-194a, and it is commonplace to assign the burden of proof to the party in control of the relevant information. See GCI Pet. 15-16 (citing authorities). By contrast, requiring the party without the necessary information to satisfy the burden of proof, as the Eighth Circuit has done here, virtually guarantees (for that party) an unfavorable outcome, and in this instance assures the foreclosure of competition throughout the area.

2. *Resale pricing*. In addition to erroneously contending that the United States does not regard the resale pricing issue as important (see *supra* p. 1), BellSouth argues against granting certiorari on this issue by defending the Eighth Circuit's decision on its merits. Because incumbent LECs will not actually abandon retailing when they also sell their services at wholesale to their competitors, BellSouth contends that it was error for the FCC to require them to exclude all retailing costs from the wholesale price they charge their resale competitors. BellSouth Br. 28.

But contrary to BellSouth's strawman, the FCC never "assum[ed] that incumbent LECs will abandon retailing." *Id.* It instead simply held that any retailing costs should be excluded from the wholesale price. Those costs are not incurred as part of any wholesale transactions, and therefore "will be avoided by the incumbent LEC" when it acts as a wholesaler. 47 U.S.C. § 251(*c*)(4).

BellSouth acknowledges that the Eighth Circuit's invalidation of that pricing method will require competitors to subsidize the incumbents' retailing costs. It does not deny that no carrier will use resale under that circumstance, but blithely attributes that result to Congress. BellSouth Br. 27 n.23. But Congress would not have sought to create an entry vehicle that could never successfully be used. As the United States (United States Resp. Br. 19-20) correctly explains, "the Eighth Circuit's holding threatens to read resale out of the 1996 Act as an option for entry into local telecommunications markets." The Court should grant certiorari on this issue so that the "three ways" by which "a requesting carrier can obtain access to an incumbent's network," *Iowa Utils. Bd.*, 525 U.S. at 371, are not arbitrarily and unlawfully reduced to two.[1]

3. *Network element combinations.* BellSouth advances four arguments why the Court should decline to resolve the circuit conflict on this issue. Each is baseless.

First, BellSouth contends that the circuit conflict, if left alone, will go away. Now that the Eighth Circuit has "explained" to the Ninth Circuit that the Ninth Circuit was wrong, BellSouth posits, the Ninth Circuit will withdraw from the holding that it has applied in three separate decisions: *U S WEST Communications* v. *Hamilton*, Nos. 99-35586 et al., 2000 WL 1568707 (9th Cir. 2000); *MCI Telecomms. Corp.* v. *U S WEST Communications*, 204 F.3d 1262, 1268 (9th Cir. 2000), *cert. denied*, 69 U.S.L.W. 3332 (U.S. Nov. 14, 2000) (No. 00-214); *U S WEST Communications* v. *MFS Intelnet, Inc.*, 193 Fd.3d 1112 (9th Cir. 1999), *cert. denied*, 120 S. Ct.

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[1] BellSouth also suggests – citing a newspaper article from 1997 – that AT&T does not intend to engage in resale. BellSouth Br. 26-27 & n.22. As AT&T explained, however, its business plan now relies in part on resale. AT&T Pet. 24. Obviously, AT&T and WorldCom would not be seeking certiorari on the issue, the incumbent LECs would not be seeking to invalidate the FCC's resale pricing methodology, and the United States would not regard the issue as of "considerable importance," unless they all believed that resale would in fact be used to provide competing services.

2741 (2000). BellSouth Br. 16-17, 19. BellSouth states that the Ninth Circuit will take this unusual step because it will believe itself "required to follow the Hobbs Act court's holdings." *Id.* at 19.

BellSouth's prediction is demonstrably wrong, because the Ninth Circuit has already shown it will not defer to the Eighth Circuit's most recent decision. In its Order on rehearing in *Hamilton* – issued approximately five weeks ago, well *after* the Eighth Circuit reaffirmed its view of Rules 315(c)-(f) on remand – the Ninth Circuit noted that the Oregon commission "indicated that it would require combination of unbundled network elements consistent with 47 C.F.R. § 51.315(b)-(f) (2000)" and held again that "[s]uch requirements are clearly valid under our decisions in *MCI Telecommunications* and *MFS Intelnet*." *Hamilton*, WL 1568707, at *1 (citations omitted). That is unsurprising, for the Ninth Circuit previously had properly held that the Hobbs Act did not require it to follow the Eighth Circuit on issues of statutory construction. See *MCI Telecomms.*, 204 F.3d at 1268.[2]

Nor will the conflict "dissolve" because the FCC will purportedly issue a regulation forbidding state commissions from exercising their authority to require incumbents to combine elements. BellSouth Br. 19-20. The FCC has indicated no intention to adopt any such regulation, and the Eighth Circuit's decision – which did not even address the scope of permissible state commission authority – certainly did not compel any such bizarre action. Contrary to BellSouth's claim (*id.* at 18), state commissions have been "deputized" to act in this area by Congress, not by the FCC, and a decision by one court of appeals invalidating an FCC rule based on

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[2] Of course, even if the Ninth Circuit were wrong on this point – as it is not – that would be irrelevant, because the circuit conflict would still exist. It would still be the case that parties would be treated differently depending on whether their cases arose in the Ninth or the Eighth Circuits, and the need for this Court's intervention would be equally acute.

that court's (quite controversial) statutory interpretation does not bind states outside the Eighth Circuit to adopt that same interpretation in exercising their own authority.[3]

Second, BellSouth contends that the issue is not important. Although the FCC found as a factual matter in 1996, and recently reaffirmed, that there often will be no practical way for entrants to obtain network element combinations unless the incumbent is required to combine them, BellSouth nonetheless simply asserts in its brief that entrants are "perfectly able" to obtain all combinations. Compare Pet. App. 42a-43a, and *Local Competition*, 15 FCC Rcd. 3696, 3910 (¶ 482) (1999), with BellSouth Br. 21. But an administrative agency's factual findings, based on record evidence, obviously cannot be disregarded simply on the contrary and unsupported say-so of a party's brief.

Third, BellSouth contends that the issue has been waived because petitioners purportedly did not raise it when this case was first before the Court. This argument is frivolous. To begin with, although the Court did not address it, AT&T did raise the issue, both in its previous petition for certiorari and in its merits brief.[4] But even if AT&T had not, there could be no "waiver." The Eighth Circuit reopened this issue when it *directed* the parties to brief and argue the merits anew on remand. See Order at 2-3, *Iowa Utils. Bd.* v. *FCC*, Nos. 96-3321 et al. (8th Cir. June 10, 1999) ("The briefs should also

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[3] Nor is there any merit to BellSouth's suggestion that the Court should grant certiorari, if at all, in one of the Ninth Circuit cases instead of this one. The Court has already denied certiorari in the two Ninth Circuit cases where such petitions were filed – both of which pre-dated the Eighth Circuit decision below. *See supra* pp. 6-7. The most suitable vehicle for reviewing the FCC's rules is the Eighth Circuit case, because that is the case in which the administrative record supporting those rules was compiled.

[4] *See* AT&T Corp.'s Petition for a Writ of Certiorari at 9-10, 13, *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999) (No. 97-826); Brief of Petitioners AT&T Corp., et al., at 32-34, *id.*

address whether or not, in light of the Supreme Court's decision, this court should take any further action with respect to . . . § 315(c)-(f) . . . .''). The Eighth Circuit then issued a second holding on the subject, and thereby created a circuit conflict concerning the proper interpretation of this Court's decision. It is absurd to suggest that this Court should decline to resolve a circuit conflict on the theory that certiorari was "waived" before the conflict even existed.

Communist Party v. *Subversive Activities Control Board*, 367 U.S. 1 (1961) does not remotely support such a suggestion. BellSouth can characterize that case as "indistinguishable" from this one only by using ellipses to delete the portions of the decision in which the Court explained its rationale. See BellSouth Br. 14-15. The Court in *Communist Party* was moved by prudential considerations that have no application here. In that case, the petitioner's failure to raise a particular claim of "procedural error" on the first appeal put the Court of Appeals and the Supreme Court through a battery of constitutional litigation that may have been entirely unnecessary, and in the process put the agency through a possibly unnecessary set of adjudicative proceedings. The Court relied upon these considerations in the portion of its decision omitted from BellSouth's block quote: "Otherwise we would be promoting the 'sporting theory' of justice, *at the potential cost of substantial expenditures of agency time. To allow counsel to withhold in this Court and save for a later stage procedural error would tend to foist upon the Court constitutional decisions which could have been avoided had those errors been invoked earlier.*" 367 U.S. at 31 (portion omitted by BellSouth emphasized).[5]

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[5] BellSouth also cites a series of cases from the courts of appeals applying "law of the case" doctrine. BellSouth Br. 15 n.9. The principles that govern when a party does not pursue an appeal it has of right are not applicable to this Court's discretionary certiorari jurisdiction, and this Court has thus held that "law of the case cannot bind this Court in reviewing decisions below. A petition for certiorari can expose the entire case to

Finally, BellSouth contends (BellSouth 21-24) that the Eighth Circuit is correct on the merits. Even if that were the case, it would be no reason to deny certiorari to resolve an acknowledged circuit conflict on an important recurring issue. And it is not the case. As AT&T demonstrated (AT&T Pet. 26), and as the Ninth Circuit has held, this Court has rejected each of the statutory interpretations on which the Eighth Circuit relied. Indeed, BellSouth can contend otherwise only by repeatedly misstating what Section 251(c)(3) provides. Section 251(c)(3) does not "impose on incumbent LECs *only* an obligation to furnish unbundled network elements." BellSouth Br. 22 (emphasis added). It also states that such access must be provided "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." 47 U.S.C. § 251 (c)(3). The Court explained, in reversing the invalidation of Rule 315(b), that that rule "find[s] its basis" in Section 251(c)(3)'s "nondiscrimination requirement," *Iowa Utils. Bd.*, 525 U.S. at 394, and so too do Rules 315(c)-(f). Those rules are thus directly authorized by the first sentence of Section 251(c)(3), which the Eighth Circuit did not even discuss.

CONCLUSION

The petition for a writ of certiorari should be granted.

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review." *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988).

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